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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 524

CARTER MOUNTAIN TRANSMISSION CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION

and

JOSEPH P. ERNST and MILDRED V. ERNST
d/b as CHIEF WASHAKIE TV, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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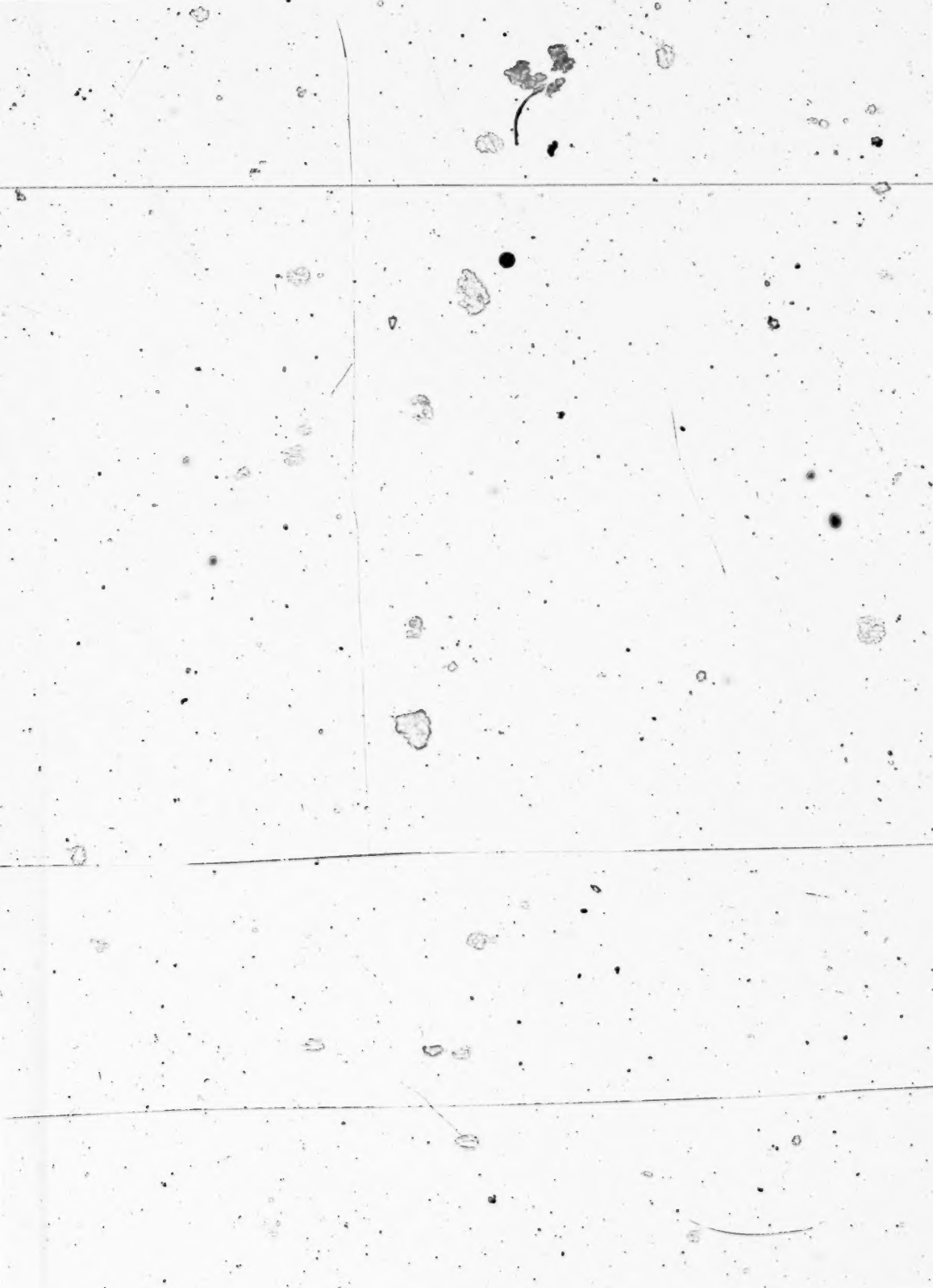

INDEX

	Page
Citations To Opinions Below	2
Jurisdiction	2
Questions Presented	2
Constitutional And Statutory Provisions Involved	3
Statement Of The Case	3
Reasons For Granting The Writ	7
I. The Court Below Has Decided Important Questions Of Constitutional And Federal Law Which Have Not Been, But Should Be Resolved By This Court	8
II. The Decision Below Is In Conflict With A Consistent Line Of Judicial And Administrative Authority, And With The Legislative History Of The Communications Act	14
Conclusion	20
Appendix A—Opinion And Judgment Below	A-1
B—Constitutional And Statutory Provisions	A-13
C—Excerpts From Prior Commission Decision Which Was Transmitted To, And Acquiesced In By Congress	A-21

TABLE OF AUTHORITIES

CASES:

American Broadcasting Co. v. United States, 110 F. Supp. 374 (1953), affirmed 347 U.S. 284 (1954)	11
A.T.&T. (Telpak), 32 F.C.C. 344 (1961)	16
A.T.&T. (Telpak), 30 F.C.C. 625 (1961)	4
A.T.&T. and Western Union Private Line Cases, 34 F.C.C. 217 (1963)	4, 5
Bantam Books v. Sullivan, 372 U.S. 58 (1963)	12
Breard v. Alexandria, 341 U.S. 622 (1951)	12

Page

CATV and TV Repeater Services, 26 F.C.C. 403 (1959) 4, 5, 19
Coal to New York Harbor Area, 311 I.C.C. 355 (1960) 16
Eastern Central Motor Carriers Assn. v. U.S., 321 U.S. 194 (1944) 16
Easton Publishing Co. v. Federal Communications Commission, 175 F. 2d 344 (D.C. Cir. 1949) 18
Federal Communications Commission v. American Broadcasting Co., 347 U.S. 284 (1954) 19
Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470 (1940) 12, 14
Frontier Broadcasting Co., 24 F.C.C. 251 (1958) 19
Intermountain Microwave, 24 F.C.C. 54 (1958) 19
Jones v. Securities Commission, 298 U.S. 1 (1936) 20
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 12
Kansas City, M. & O. Ry. Co. of Texas Construction, 295 I.C.C. 51 (1955) 15
Lovell v. Griffin, 303 U.S. 444 (1938) 12
Martin v. Struthers, 319 U.S. 141 (1943) 12
McIntire v. William Penn Broadcasting Co., 151 F. 2d 597 (3d Cir. 1945) 12, 17
National Broadcasting Co. v. United States, 319 U.S. 190 (1943) 11
Ozark and P.V.R. Co. Construction, 166 I.C.C. 441 (1930) 15
Press Private Line Case, 28 Fed. Reg. 9887 (Sept. 11, 1963) 4
Pulitzer Publishing Co. v. Federal Communications Commission, 94 F. 2d 249 (D.C. Cir. 1937) 8, 17
Saia v. New York, 334 U.S. 558 (1948) 12
Seaboard A. L. Ry. Co. Receivers Resumption of Operation, 236 I.C.C. 109 (1939) 15
Silver v. New York Stock Exchange, 373 U.S. 341 (1963) 8
Smith v. California, 361 U.S. 147 (1959) 12
United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) 12
United States v. R.C.A., 358 U.S. 334 (1959) 16
United States v. Leslie Salt Co., 350 U.S. 383 (1956) 19
Winters v. New York, 333 U.S. 507 (1948) 12

CONSTITUTION, STATUTES: Page

U. S. Constitution, First Amendment 8, 10, 11, 12, 13

Communications Act of 1934:
47 U.S.C. § 151 ..... 3, 18
47 U.S.C. § 153(b) (d) (k) 13
47 U.S.C. § 201(a) 3, 8, 12
47 U.S.C. § 214(a) (c) (d) 3, 14, 18
47 U.S.C. § 307(b) 3, 18
47 U.S.C. § 308(a) 3
47 U.S.C. § 309(a) (b) (c) 3
47 U.S.C. § 326 ..... 3, 13
47 U.S.C. § 402(b) (1) 7

Interstate Commerce Act:
49 U.S.C. 1, (18-22) 3, 14, 15
Mann-Elkins Act of 1910, 36 Stat. 539 14

MISCELLANEOUS:

S. Rept. 781, 73rd Cong. 2d Sess. 15, 16
H. Rept. 1850, 73d Cong. 2d Sess. 15
S. Rept. 1588, 74th Cong. 2d Sess. 18
H. Rept. 2589, 74th Cong. 2d Sess. 18
Administrative Procedure in Government Agencies, Monograph Of The Attorney General's Committee on Administrative Procedure, S. Doc. No. 186, 76th Cong., Part 3 14

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carter Mountain Transmission Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on May 23, 1963.

CITATIONS TO OPINIONS BELOW

The decisions of the Federal Communications Commission (R. 127, 150 and 167) appear in the Joint Appendix (pp. 127, 150 and 167), as printed for the use of the court below. The Final Decision of the Commission is reported at 32 F.C.C. 459. The opinion of the Circuit Court of Appeals is printed in Appendix A hereto, *infra*, p. A-1. This opinion had not been published in the reporter systems at the date of this petition.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 23, 1963. R. 192; p. A-12, *infra*. A timely petition for rehearing filed on June 7, 1963, was denied on July 9, 1963. R. 226. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's denial of a license to a communications common carrier, solely because of the nature and the lawful use of the intelligence to be transmitted by its customer, constitutes censorship in violation of the First Amendment to the Constitution and of the Communications Act of 1934.

2. Whether the Commission has unlawfully subordinated the public's right to common carrier communications service to broadcasting interests, contrary to the Communications Act.

3. Whether Congress, by considering and failing to overturn contemporaneous Commission decisions, acquiesced in and approved of their holding (contrary to

the instant case) that the public cannot, under the Communications Act, validly be denied common carrier service in order to protect broadcasting interests.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution along with the following sections of the Communications Act of 1934, as amended, are set forth in Appendix B hereto: Sections 1, 201(a), 214(a) (c) and (d), 307(b), 308(a), 309(a) (b) and (c), and 326 (47 U.S.C. §§ 151, 201(a), 214(a) (c) and (d), 307(b), 308(a) (b) and (c) and 326). Appendix B also contains Section 1 (18-22) of the Interstate Commerce Act (49 U.S.C. § 1 (18-22).

STATEMENT OF THE CASE

Petitioner is a communications common carrier which renders service within the State of Wyoming by means of radio microwave facilities pursuant to authority granted by the Federal Communications Commission under the Communications Act of 1934. Petitioner's service consists of the transmission of television signals to reception points specified by its customers from points at which the signals are picked up off of the air by means of antennas of petitioner's customers. This identical type of service is rendered by the American Telephone and Telegraph Company, smaller telephone companies, and specialized carriers similar to petitioner.

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[1] Petitioner reserves the right to argue that the Commission's conclusion that the rendition of the common carrier service, at issue, would result in the demise of a television broadcasting station, is not supported by adequate findings and substantial evidence.

Television program transmission service by common carriers represents one form of private line communications service.[2] Both A.T. & T. and The Western Union Telegraph Company provide many other forms of private line service between specified locations of a given customer. These forms of service include telephone, teletypewriter, telephotograph (facsimile), and data services, and are provided to businesses, including newspapers which are large users of teletypewriter and telephotograph services.[3] The same type of electromagnetic circuit is used to provide all of these private line services. However, the required width of the channel increases as the use progresses from the written word through the spoken word up to communications in picture form.[4]

A.T. & T. provides the bulk of the television transmission service throughout the Nation by means of a combination of its microwave radio facilities and its coaxial cable system. Most of the subscribers to this service are broadcasting stations which receive network-originated programs by this means. Many of the broadcasting stations are located along A.T. & T.'s cross-country coaxial cable and microwave systems. Stations not so situated might be served by means of a microwave system especially provided by A.T. & T. and connecting to the cross-country system. Remotely

[2] *CATV and TV Repeater Services*, 26 F.C.C. 403, 433 (1959); pertinent excerpts from this case are quoted in Appendix C, hereto, at page A-21.

[3] *A.T.&T. and Western Union Private Line Cases*, 34 F.C.C. 217, 250, 368 (1963); *Press Private Line Case*, 28 Fed. Reg. 9887 (Sept. 11, 1963).

[4] *American Telephone & Telegraph Co.* (Telpak), 30 F.C.C. 625 (1961).

located broadcasting stations, which do not find such direct connections economically feasible, might intercept a distant station's signal off of the air and utilize a microwave service (such as that provided by petitioner or by A.T. & T.) to transmit the signal to its station facilities for re-broadcasting purposes.

This type of microwave service would also be available, but economically unfeasible, to individuals whose television reception is unsatisfactory due to disadvantageous geographical locations. Community antenna television systems have been operated in order to provide an economically feasible means of television reception for individuals who cannot obtain satisfactory service by means of the usual antenna arrangements within or on top of the television sets or on rooftops. Community or master antennas are usually constructed at geographical elevations favorable to television reception, and the video signals, so obtained, are transmitted on cable to individual television sets within a given community. As the distance between the master antenna and the community increases, the antenna operator often finds it desirable to utilize the service of a communications common carrier to transmit the signal from the antenna to the community. The signal is then carried on the wire facilities of the antenna operator to the individual television receiving sets.[5]

Private line service is rendered either by means of wire or microwave radio facilities, or a combination of both.[6] If the common carrier provides the service

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[5] *CATV and TV Repeater Services, supra*, at pp. 407-409.

[6] *A.T.&T. and Western Union Private Line Cases, supra*, at pp. 255, 256, and 288 n. 17.

by means of wire facilities and no state boundaries are crossed, no federal operating authority is required. However, if the carrier operates by means of microwave radio, as does petitioner, or if the wire facilities form an interstate circuit, authority must be obtained from the Federal Communications Commission.

Petitioner serves both a television broadcasting station and several community antenna systems under existing federal authority. On April 28, 1958, petitioner filed an application with the Commission for authority to expand its common carrier service to its existing community antenna customer, Western Television Corporation. Petitioner sought authority to use available radio frequencies assigned to the common carrier service. The application was granted on April 22, 1959, but the grant was stayed by Commission order of June 29, 1959, following a protest by the respondent television broadcasting station, Chief Washakie TV. A hearing was held and the Hearing Examiner proposed to grant the application in his Initial Decision of May 25, 1961. (R. 127). The Commission, by its Final Decision of February 16, 1962, reversed its Hearing Examiner and denied the application solely because the proposed service allegedly would enable petitioner's customer to compete more effectively with the responder+ television station (R. 150). As a result, the customer was denied common carrier service; and the common carrier radio frequencies requested by petitioner remained unused. In denying petitioner's application, the Commission was forced to overrule all of its prior precedent.

Petitioner appealed from the Commission's denial of its application to the United States Court of Appeals for the District of Columbia Circuit under Sec-

tion 402(b), (1) of the Communications Act, 47 U.S.C. § 402 (b) (1). The court affirmed the Commission's action and held that television broadcasting interests were the dominant consideration in determining whether a communications carrier should be authorized to honor a request for its services.

REASONS FOR GRANTING THE WRIT

The questions presented raise issues of fundamental importance to all users of common carrier communications services. This telecommunications industry is becoming indispensable in the dissemination of intelligence. Modern society thrives upon, indeed demands, rapidity of movement. Almost all conceivable facets of intelligence are communicated by rapid means. The electromagnetic circuit, the modern vehicle for the carriage of intelligence, forms the vital link between stock exchange and broker, radar outpost and military nerve center, teacher and remote student, and one home and another. In modern society, the electromagnetic circuit has replaced the pamphlet, the soapbox, and the public square as the market place of ideas.

There should be little wonder why the telecommunications industry has been subject, as a form of public utility service, to governmental regulation in order to insure adequate and indiscriminate service at reasonable charges to the public. There has been federal regulation of telecommunications by telephone and telegraph since 1910, originally by the Interstate Commerce Commission, and since 1934 by the Federal Communications Commission. However, not until the instant case has the federal administrative agency, charged with protecting the right of the public to

telecommunications service, denied such service to one proposing to use it in a lawful endeavor.[7]

There is even a more basic and fundamental protection, over and above the usual rights of users of public utility service, available to those choosing to communicate by means of the services and facilities of the communications carriers. This protection is offered under the guarantees of freedom of speech and press contained in the First Amendment.

I.

The Court Below Has Decided Important Questions of Constitutional and Federal Law Which Have Not Been, But Should Be, Resolved by This Court

Communications carriers, including petitioner, are under a statutory "duty" to furnish "communication service upon reasonable request." 47 U.S.C. 201(a). The "public has the legal right to demand" their services.[8] Although this right specifically emanates from the Communications Act, it is consistent with the freedoms of speech and press guaranteed by the First Amendment. Nevertheless, the court below held that this right of the public to service, together with the corresponding duty of the carrier to provide it, was subservient to broadcasting interests. Petitioner's proposed service allegedly would improve its customer's competitive position with respect to a tele-

[7] This Court has faced the issue of attempted denial to the public of telecommunications service by a private agency, *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), but never by the federal agency whose function is to protect the right of the public to such service.

[8] *Pulitzer Publishing Co. v. Federal Communications Commission*, 94 F. 2d 249, 251 (D.C. Cir. 1937).

vision station and thus, according to the court below, would jeopardize the survival of the station.[9]

Under the court's holding, the broadcasting industry has been accorded a preferential position over all other industries in our economy. Broadcasting interests can form the basis for a denial of common carrier communications service to the public. There are many other industries, in addition to community antennas, which might be said to compete with television stations. The press competes with television for advertising and for the attention of the public. The press is making progressively greater use of rapid communications services, including telephotograph, remote typesetting and teletypewriter transmissions.[10] Under the principle of the decision below, the rights of the press to such services are contingent upon the Commission's evaluation of the economic effects upon television stations resulting from any enhancement of the press' competitive position due to its use of rapid communications services.

In disposing of the constitutional questions of freedom of speech and press, the court held that an ap-

[9] Petitioner reserves the right to argue that the record before the Commission does not warrant any conclusion that the survival of the station would be jeopardized or its demise made imminent by the rendition of petitioner's proposed service to its customer. The court below predicated its erroneous conclusion in this regard, in part, upon a misunderstanding of the record. After petitioner explained this misunderstanding to the court (R. 197), it amended its opinion (R. 225) by deleting a factual recitation which was contrary to the record, but substantially in support of the erroneous conclusion regarding the jeopardy to the television station. Nevertheless, the court maintained this erroneous conclusion in its opinion without any explanation of its validity in view of the corrected factual situation.

[10] See authorities cited in footnote 3, *supra*.

plicant for a communications common carrier license has no constitutional right to a grant thereof, and that an applicant cannot invoke the rights of a would-be user of the service because they are contingent upon a grant of the application. This circuitous reasoning renders nugatory the rights guaranteed by the First Amendment when the communications medium is a common carrier.

The Commission did not deny the application because of any deficiency on the part of petitioner's proposal. Petitioner merely proposed what it had been certificated to do: transmit lawful communications of the public for hire upon request. The Commission denied the application because of the nature of the intelligence to be transmitted by petitioner's customer and the manner in which the customer might utilize the intelligence. The Commission indicated that it might reconsider and grant the application if petitioner showed that its customer, the antenna operator, would conduct its business in a manner consistent with the television station's interest. Thus, petitioner would be authorized to carry the identical intelligence it now proposes to carry if its customer would agree to use that intelligence in the manner specified by the Commission.

However, Congress has not delegated any authority to the Commission to license the antenna operator or to regulate its activities. As explained hereinafter, the Commission unsuccessfully sought an enlargement of its authority by Congress in order to impose directly the same restrictions on the operations of community antennas that would be imposed indirectly through a conditional grant of petitioner's application. When the Commission seeks to accomplish an objective be-

yond its statutory authority by preventing the dissemination of intelligence, its ultra vires actions "may be considered as a form of censorship and to that extent they would be in violation of the First Amendment." *American Broadcasting Co.* v. *United States*, 110 F. Supp. 374 (1953), *affirmed* 347 U.S. 284 (1954).

The rights under the First Amendment of users of common carrier communications services could never effectively be enforced if the carrier's operating authority is denied because of the nature and proposed use of the communications desired to be transmitted by the non-jurisdictional customer, whose rights are made contingent upon a grant of the operating authority to the carrier. Under the principle of the decision below, the Commission could examine and censor the proposed communications to be transmitted by a carrier for any person not otherwise subject to the agency's authority if that person's non-jurisdictional conduct was found to be economically detrimental to a broadcasting station.

The fallacy in the reasoning of the opinion below, appears from the court's misplaced reliance upon this Court's decision in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 216-17 (1943). *NBC* held that the constitutional right of free speech was not abridged by Commission regulations designed to refuse licenses to broadcasters engaged in objectionable practices. Such practices were deemed to be inconsistent with the obligations of the broadcasters as relating to the interests of the broadcasting audience. However, a broadcasting station is not a public utility, as is petitioner, and the public's right to enjoy the programming of a particular station is circumscribed by the station's obligations to the public interest in broad-

casting.[11] The public has no right, constitutional or statutory, of access to a broadcasting station's microphone or television camera.[12] On the other hand, the public has the legal right to demand common carrier communications service.[13] Accordingly, *NBC* is not apposite to the question of the public's right under the First Amendment to common carrier communications services.

The rights of freedom of speech and freedom of press embrace not only the publication of intelligence, but also its dissemination and distribution, as well as its reception.[14] If the flow of intelligence is dammed at any point by prior governmental restraint, a constitutional question is presented. The Commission's restraint in this case was imposed upon the carrier, an indispensable link in the communications stream. The guarantees of the First Amendment protect all modern modes of communications.[15] These guarantees protect not only the dissemination of ideas and doctrines, but also entertainment and other matters disseminated under commercial auspices.[16]

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[11] *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

[12] *McIntire* v. *William Penn Broadcasting Co.*, 151 F. 2d 597 (3d Cir. 1945).

[13] 47 U.S.C. 201 (a). See also *Pulitzer* case, cited in footnote 8.

[14] *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963); *Martin* v. *Struthers*, 319 U.S. 141 (1943); and *Lovell* v. *Griffin*, 303 U.S. 444 (1938).

[15] *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 502 (1952); *Saia* v. *New York*, 334 U.S. 558 (1948); *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

[16] *Smith* v. *California*, 361 U.S. 147, 150 (1959); *Breard* v. *Alexandria*, 341 U.S. 622, 642 (1951); *Winters* v. *New York*, 333 U.S. 507, 510 (1948).

It is just as much a violation of the First Amendment to deny the right of the pamphlet distributor to go upon the streets of a community, as it is to refuse to license a communications common carrier to transmit lawful communications for a customer engaged in a lawful pursuit. Telephone, telegraph and other common carrier communications services are indispensable in our modern society in communicating intelligence. Congress has not delegated authority to the Commission to censor the content of intelligence transmitted by means of a common carrier, nor to deny its service to one requesting it for lawful purposes.[17] Nor could Congress have constitutionaliy delegated such authority.

The public has both a constitutional and statutory right to disseminate intelligence by means of communciations common carriers. It does not matter whether such dissemination takes the form of television signals or the printed or spoken word. That one form of communication may be more competitively disadvantageous to a television station than another form of communication is of no import.

The fundamental questions presented herein warrant examination and resolution by this Court.

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[17] The Communications Act expressly forbids the Commission from exercising "the power of censorship over the radio communications or signals transmitted by any radio station." 47 U.S.C. § 326. A "radio station" as defined in the Act, includes a common carrier radio transmission facility as well as a broadcasting station. 47 U.S.C. § 153 (b), (d) and (k).

II.

The Decision Below Is in Conflict With a Consistent Line of Judicial and Administrative Authority, and With the Legislative History of the Communications Act

The erroneous holding below, that the right of public access to telephone, telegraph and other common carrier communications services was curtailed through the combination of broadcasting with common carrier regulation under the Communications Act, represents a departure from precedent and prejudices the rights of users of telecommunications services.

The decision below conflicts in principle with decisions of this Court holding that communications carriers are to be regulated "in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission." *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940). The Communications Act of 1934 was a codification of several statutes, and transferred certain authority from several agencies to the Communications Commission. The Mann-Elkins Act of 1910 (36 Stat. 539) extended the general regulatory jurisdiction of the Interstate Commerce Commission to all telegraph, telephone, and cable lines, whether wire or wireless, used in transmitting messages in interstate or foreign commerce. In fact, this was the first statute relating to radio.[18] Broadcasting regulation came later. The pertinent common carrier licensing provisions in the Communications Act, 47 U.S.C. § 214 (a) (c) and (d), cited and construed by the court below, were derived from Section 1 (18-22) of the Interstate Commerce

[18] *Administrative Procedure in Government Agencies, Monograph Of The Attorney-General's Committee on Administrative Procedure*, S. Doc. No. 186, 76th Cong., Part 3, pp. 81-84.

Act.[19] All of the Commerce Commission's reported decisions, which have been found, decided under the latter-mentioned statutory provisions, support the proposition that a person engaged in a lawful endeavor has a legal right to obtain common carrier service, notwithstanding any resulting adverse economic effect upon his competitors.[20]

The legislative history of the Communications Act discloses an explicit congressional intent to embody therein the case precedent developed under the Commerce Act. According to the relevant congressional reports:

> "In this Bill [Communications Act of 1934] the attempt has been made to preserve the value of court and Commission interpretation of that Act [Interstate Commerce Act], but at the same time modifying the provisions so as to provide adequately for the regulation of communications common carriers." [21]

> "In this Bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communica-

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[19] 49 U.S.C. § 1 (18-22). S. Rept. 781, 73d Cong., 2d Sess.; H. Rept. 1850, 73d Cong., 2d Sess.

[20] *Ozark and P.V.R. Co. Construction*, 166 I.C.C. 441 (1930); *Seaboard A.L. Ry. Co. Receivers Resumption of Operation*, 236 I.C.C. 109 (1939); *Kansas City, M. & O. Ry. Co. of Texas Construction*, 295 I.C.C. 51 (1955).

[21] H. Rept. 1850, 73d Cong., p. 4.

tions rather than as a manifestation of Congressional attempt to obtain a different objective."[22]

The court below patently contravened congressional intent in holding that the Commission was not:

> "required to adopt the rationale of the cited decisions of the Interstate Commerce Commission. These decisions are of little relevance here. Questions of competitive injury in the transportation field are very different from questions of public injury in the field of communications."

Indeed, the Communications Commission has recently relied upon cases of competitive injury in the transportation field in a communications carrier case involving questions of public injury.[23] The court's holding that Commerce Commission case precedent is "of little relevance" to a communications common carrier case is novel and revolutionary, conducive to confusion in the communications carrier regulatory field, contrary to the legislative history of the Communications Act, and in direct conflict with prior holdings of this Court.

Separate and distinct principles of regulatory law apply to the broadcasting and telecommunications industries even though they are regulated under the same statute by a single agency. *United States* v. *R.C.A.*, 358 U.S. 334, 348-9 (1959). The public has the legal right of access to the services of a communications carrier but not those of a broadcasting station. This

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[22] S. Rept. 781, 73d Cong., p. 2.

[23] In *A.T.&T.* (*Telpak*), 32 F.C.C. 344 (1961), the Commission relied upon *Eastern Central Motor Carriers Assn.* v. *U.S.*, 321 U.S. 194 (1944); and *Coal to New York Harbor Area*, 311 I.C.C. 355 (1960).

has been consistently and uniformly recognized by the courts prior to the decision below.[24]

The state of the art in modern communications has advanced to the point that the transmission of telegraph, voice, television, facsimile, and data signals may be performed interchangeably or simultaneously by the carrier by means of the same facility, be it wire, radio, or a combination of the two. Accordingly, it would be impractical, if not impossible, to apply different regulatory standards to applications for authority to construct a facility depending upon the type of signal to be transmitted. The transmission of television signals by common carriers cannot be singled out for different regulatory treatment. The denial of the traditional right of access to common carrier communications services for the transmission of one type of signal means the denial of the right for the transmission of all. The importance of this case is obvious because the holding of the court below is applicable to all communications common carrier licensing cases involving the transmission of all types of signals by wire as well as radio facilities.

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[24] *McIntire* v. *William Penn Broadcasting Co*; *supra*, at p. 601:

"[A] radio broadcasting station is not a public utility in the sense it must permit broadcasting by whoever comes to its microphones."

Pulitzer Publishing Co. v. *Federal Communications Commission*, *supra*, at p. 251:

"[A] radio broadcasting station is [not] a public utility in the sense that a railroad is a public utility. Generally speaking, that term comprehends any facility employed in rendering quasi public service such as waterworks, gas works, railroads, telephones, telegraphs, etc. The use and enjoyment of such facilities the public has the legal right to demand; but its right to the use and enjoyment of a privately owned radio station is of a much more limited character."

In holding that the Commission's broadcast responsibilities were paramount over its common carrier obligations, the court below misplaced its reliance upon a provision in Section 1 of the Communications Act (47 U.S.C. § 151) which, to the contrary, supports the traditional right of access to common carrier services. The cited provision indicates that it was Congress' purpose in enacting the statute "to make available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges." The only services under the Communications Act which must be rendered at "reasonable charges" are those provided by common carriers. Moreover, the terms "adequate facilities" appear again in the Act only in reference to common carrier services. 47 U.S.C. § 214(d). There is nothing in the Communications Act supporting the holding below that the public's right to common carrier services was diminished in 1934 by the enactment of this statute.[25]

The Commission has heretofore consistently held that it cannot validly deny a common carrier authorization in order to reach a community antenna custo-

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[25] The holding below was erroneously premised, in part, upon Section 307(b) of the Communications Act (47 U.S.C. § 307(b)), requiring an equitable distribution of radio service among the several states and communities. Section 307(b) relates to applications for *broadcasting* licenses and is not relevant to common carrier licensing, as is evident from the legislative history of this section (S. Rept. 1588, 74th Cong. pp. 2, 3; H. Rept. 2589, 74th Cong. p. 3), as well as from *Easton Publishing Co.* v. *F.C.C.*, 175 F. 2d 344 (D.C. Cir. 1949), decided in reliance upon *Sanders Bros., supra.*

mer of the carrier, and thus prevent an indirect economic impact upon a broadcasting station.[26] Pertinent portions of the Commission's 1959 decision in this respect are set forth in Appendix C hereto. The Commission transmitted a copy of this decision to Congress and requested enlargement of its jurisdiction enabling it to protect broadcasting stations from community antenna competition by prohibiting the antenna operators from receiving the signals of a distant station which duplicate the local station's programs and requiring the operators to make the programs of the local station available on their systems. Congress refused to enlarge the Commission's jurisdiction.

The court below overlooked Congress' acquiescence in the Commission's prior decisions holding contrary to its decision in the instant case. In deciding questions of the statutory authority of administrative and executive agencies, courts traditionally accord great weight to congressional actions relating to, and contemporary with, decisions and legislative proposals of the agencies. This Court has invalidated Commission actions, as beyond its statutory authority, when the agency theretofore unsuccessfully sought authority from Congress to accomplish the same objective. *F.C.C.* v. *American Broadcasting Co.*, 347 U.S. 284 (1954). See also *United States* v. *Leslie Salt Co.*, 350 U.S. 383 (1956).

The conclusion is inescapable that Congress has acquiesced in, and approved of, the Commission's

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[26] *CATV and TV Repeater Services*, 26 F.C.C. 403 (1959); *Intermountain Microwave*, 24 F.C.C. 54 (1958). See also, *Frontier Broadcasting Co.*, 24 F.C.C. 251 (1958).

decisions holding that no authority has been delegated to it to regulate community antennas, either directly or indirectly through denial of licenses to common carriers proposing to serve the antenna systems. Accordingly, it is evident that the court not only ignored the legislative history of the Communications Act compiled prior to its enactment in 1934, but also overlooked contemporaneous congressional acquiescence in the Commission's disclaimer of the very authority that it has asserted in this case. The Commission's jurisdiction over common carriers is not reasonably designed for regulation of the private business of the carriers' customers. This position is *a fortiorari* in view of the Commission's unsuccessful attempt to have its jurisdiction extended to reach the community antenna industry, of which petitioner's customer is a part.

CONCLUSION

Broadcasting interests are not paramount to the public's constitutional and statutory right to common carrier communications service. If broadcasting interests require protection, the lawful procedure is congressional action, if warranted, extending the Commission's authority to reach persons deemed to be in competition with broadcasting stations. Neither administrative fiat nor judicial legislation can validly enable the Federal Communications Commission to reach such persons by trodding upon their constitutional and statutory rights. "The philosophy that constitutional limitations and legal restraints upon official action may be brushed aside upon the plea that good, perchance, may follow, finds no countenance in the American system of government." *Jones* v. *Securities Commission*,

298 U.S. 1, 27 (1936). For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

October 7, 1963.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,089

CARTER MOUNTAIN TRANSMISSION CORPORATION, APPELLANT,

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE.

JOSEPH P. ERNST AND MILDRED V. ERNST
d/b/as Chief Washakie TV, INTERVENOR.

On Appeal from an Order of the
Federal Communications Commission

Decided May 23, 1963

Mr. E. Stratford Smith, with whom *Mr. Robert E. Cone* was on the brief, for appellant. *Mr. Thomas G. Shack* also entered an appearance for appellant.

Mr. Daniel R. Ohlbaum, Associate General Counsel, Federal Communications Commission, with whom *Mr. Max D. Paglin*, General Counsel, and *Mrs. Ruth V. Reel*, Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. Vernon L. Wilkinson, with whom *Mr. James A. McKenna, Jr.*, was on the brief, for intervenor.

Mr. Robert D. L'Heureux filed a brief on behalf of National Community Television Association, Inc., as *amicus curiae*, urging reversal.

Mr. Robert V. Cahill filed a brief on behalf of National Association of Broadcasters, as *amicus curiae*, urging affirmance.

Before BAZELON, Chief Judge, and WILBUR K. MILLER and WASHINGTON, Circuit Judges:

WASHINGTON, *Circuit Judge:* This is a telecommunications case, in which a challenge is made to the power of the Federal Communications Commission to refuse to grant to a common carrier by radio of facilities to be used by community antenna systems,[1] because of the impact of the proposed grant upon an existing television station.

Carter Mountain Transmission Corporation, appellant here, is a common carrier by radio. It filed an application with the Commission for permission to construct a microwave radio communication system to transmit signals—received from television stations located in several distant cities—to community antenna systems established in the towns of Riverton, Lander, and Thermopolis, Wyoming, by Western Television Corporation. A protest was filed by the licensee of television station KWRB-TV, in Riverton, Wyoming, now an intervenor in this appeal. The Commission caused a hearing to be held, after which the

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[1] Community antenna systems (CATV) "amplify and distribute television signals of good quality to areas where reception is non-existent or difficult. Reception is bolstered in weak signal areas by the installation of a common antenna for the whole area at a favorable location, such as a high hill or a mountain. The antenna picks up a steady signal from a distant television broadcast station, and transmits it by wire to the cable of the community receiving service. Individual television sets of subscribers are connected to the cable, and relay amplifiers are located throughout the system so that each home receives an equally clear signal regardless of location." Clarksburg Publishing Co. v. Federal Communications Commision, 96 U.S. App. D.C. 211, 217 n. 16, 225 F. 2d 511, 517 n. 16 (1955). See also Lilly v. United States, 238 F. 2d 584, 586 (4th Cir. 1956).

Examiner recommended denial of the protest. The Commission reversed, granted intervenor's protest, and denied appellant's application. This appealed followed.[2]

The Commission concluded that it would not serve the public interest, convenience, and necessity to grant appellant's application. Its reasoning was essentially this: that to permit appellant to bring in outside programs for the community antenna system on the basis proposed would result in the "demise" of the local television station (intervenor KWRB-TV) and the loss of service to a substantial rural population not served by the community antenna systems, and to many other persons who did not choose (or were unable) to pay the cost of subscribing to the community antenna systems; and that the need for the local outlet outweighed the improved service which appellant's proposed new facilities would bring to those who subscribed to the community antenna systems. The Commission, however, expressly gave appellant leave to refile its application when it could show that the community antenna systems would carry the signal of the local outlet (intervenor) and would not duplicate its programming.

The parties have agreed on six questions for our consideration. We will take them up seriatim, stating the questions as presented to us.

> "1. Whether the Commission's denial of Appellant's application is based upon an erroneous application of principles of radio broadcast law to a case of common carrier licensing."

Appellant's argument on this point is in essence that the Commission was required to apply classic common carrier criteria in considering its application, and that under these criteria the Commission would have been obliged to grant

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[2] Under Section 402(b)(1) of the Communications Act of 1934, as amended, 66 STAT. 718 (1952), 47 U.S.C. § 402(b)(1) (1958).

a certificate of convenience and necessity authorizing construction of the requested common carrier facilities. The statement is made that under the Communications Act common carriers are regulated "in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission,"[3] and a number of decisions of the Interstate Commerce Commission are cited for the proposition that the latter Commission will not deny a permit for construction and operation of common carrier facilities in the field of transportation because of economic impact upon the competitors of the carrier's proposed customer.[4]

We do not think the Communications Commission applied incorrect legal principles in reaching its decision, or that it was required to adopt the rationale of the cited decisions of the Interstate Commerce Commission. Those decisions are of little relevance here. Questions of competitive injury in the transportation field are very different from questions of public injury in the field of communications.[5] Here the Federal Communications Commission is charged with the duty of regulating not only common carriers by radio but broadcasters of television programs. It cannot let its decisions in the radio carrier field interfere with its responsibilities in the television broadcasting field. In both fields, it must "make avail-

[3] Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470 at 474 (1940); *cf.* Mackay Radio & Tel. Co. v. Federal Communications Commission, 68 App. D.C. 336 at 338, 97 F. 2d 641 at 643 (1938).

[4] Ozark and P.V.R. Co. Construction, 166 I.C.C. 441 (1930); Seaboard A.L. Ry. Co. Receivers Resumption of Operation, 236 I.C.C. 109 (1939); Kansas City, M. & O. Ry. Co. of Texas Construction, 295 I.C.C. 51 (1955).

[5] We note that, even so, the Interstate Commerce Commission is obliged to give weight to "considerations of national policy with respect to the transportation system." Interstate Commerce Commission v. Railway Labor Executives Association, 315 U.S. 373, 377 (1942).

able, so far as possible, to all the people of the United States," adequate and efficient service. See Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. § 151 (1958). A common carrier by radio cannot construct a new facility or extend its existing facilities *sua sponte*: it must first obtain a certificate or license from the Commission, authorizing it to establish such facilities, and before awarding the authority the Commission must be convinced that the proposal is "reasonably required in the interest of public convenience and necessity." See 47 U.S.C. § 214(a)(c) and (d) (1958). The interest of the listening and viewing public in better and more effective service is paramount. See *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17 (1943); *Federal Radio Commission v. Nelson Brothers Co.*, 289 U.S. 266, 285 (1933). And in the common carrier field, as well as in the broadcasting field, "competition is a relevant factor in weighing the public interest." *Federal Communications Commission v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953); cf. *Mansfield Journal Co. v. Federal Communications Commission*, 86 U.S.App.D.C. 102, 180 F.2d 28 (1950).

Relevant, too, is the congressional mandate that the Commission "make such distribution of licenses, frequencies, . . . and of power among the several States and communities as to provide a fair, efficient and equitable distribution of . . . service to each of the same." Section 307(b) of the Communications Act, 47 U.S.C. § 307(b) (1958). It is axiomatic that in carrying out its obligations under Section 307(b), as in considering the comparative qualifications of applicants for the same frequency or channel, the Commission may weigh the net effect on the community or communities to be served. See *Pinellas Broadcasting Co. v. Federal Communications Commission*, 97 U.S. App.D.C. 236, 230 F.2d 204, cert. denied, 350 U.S. 1007 (1956); cf. *Federal Communications Commission v. Allentown Broadcasting Co.*, 349 U.S. 358 (1955). It neces-

sarily follows that in determining whether the authorization requested by appellant would be in the public interest the Commission was entitled — if indeed it was not obliged — to consider the use to which the facilities and frequencies requested were to be put, and to weigh that use as against other legally relevant factors, including the effect on existing local stations. Cf. *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961).[6]

> "2. Whether the Commission's denial is an arbitrary and capricious denial of access to common carrier communications facilities to which Appellant's proposed customer is entitled as a matter of law."

This question must be answered in the negative. There is no basis for the view that appellant's proposed customer is entitled to access to appellant's proposed facilities as a matter of law. Congress has made its "right" to access depend on whether the appellant obtains a license from the Federal Communications Commission under the standard of public convenience and necessity. The Commission's action in this case is not in our opinion arbitrary and capricious, for the reasons set out above, and for additional reasons to be stated later.

> "3. Whether the Commission's denial for the reasons indicated constitutes an extension of its

[6] In the *Transcontinental* case, the Federal Power Commission denied an application for the transportation of natural gas because the proposed end use — burning the gas under industrial boilers — was deemed inferior to other possible uses. The Supreme Court approved the denial, saying that the Federal Power Commission is authorized to consider end uses in determining "public convenience and necessity." 365 U.S. at 7. By parity of reasoning, the Federal Communications Commission, in determining the issue now presented, can consider the "end use" or "end result" of the application made to it by appellant.

authority beyond its statutory jurisdiction to regulate community antenna systems."

Appellant points out that the Commission has no direct jurisdiction or authority over community antenna systems, and in fact has asked Congress—so far unsuccessfully—for such authority. It argues that the Commission has nevertheless attempted to regulate Western, the community antenna proprietor, without legal authority, when it included in the order denying appellant's application the words "without prejudice to refiling when a showing can be made that the duplication of programming is adequately avoided and a satisfactory arrangement is arrived at by which the cable system will carry the local KWRB TV service."

We cannot agree that this amounts to an attempt to regulate Western's antenna system, even though it may have an indirect effect on that system. The Commission was considering appellant's application in its relevant setting, and the clause quoted moderated its denial of the application by granting appellant the opportunity to show that the threatened damage to the local station would not in fact occur, i.e., that Western will not duplicate the latter's programs and will transmit the latter's signal to Western's subscribers. To be sure, appellant would have to secure the cooperation of Western to make such a showing, but in the circumstances this does not appear to us an unreasonable condition for the granting of appellant's application to construct facilities from which Western would presumably benefit. The Commission deemed adequate protection of the local station to be in the public interest, and instead of denying appellant's application outright, as it might have done, it offered the appellant the opportunity to secure what it was seeking if it protected the public interest.

"4. Whether the Commission's denial constitutes unlawful or unconstitutional censorship of public communications."